

**REMARKS**

The pending Office Action addresses claims 1-23, with claims 4, 6, 11, and 17-23 being withdrawn from consideration.<sup>1</sup> Claims 1-3, 5, 7-10, 12-14, and 16 stand rejected. Reconsideration and allowance is respectfully requested based on the remarks submitted herewith.

***Amendments to the Specification***

Applicants amend the paragraphs [0006] and [0037] of the published application to correct minor typographical errors. No new matter is added.

***Amendments to the Claims***

Applicants amend claims 1 and 12 to recite that the distal portion of the implant-gripping member or implant-gripping portion includes opposed legs that are adapted to be positioned under a distal end of a rod-receiving member of a spinal implant. Support for this amendment can be found throughout the specification and drawings, as well as in original claim 3. Claim 3 is amended to delete the limitations added to claim 1. Claim 6 is amended to correspond to amended claim 1. No new matter is added.

Withdrawn claims 17-32 are cancelled. However, Applicants reserve the right to pursue these claim in a divisional application.

***Election/Restrictions***

Applicants confirm the election of Group 1, Figure 1, claims 1-3, 5, 7-10, 12-14, and 16, which was made without traverse during a telephone conversation with the Examiner on June 21, 2006. However, Applicants note that Lisa Adams, not Stephen A. Soffen, made the election. Accordingly, claims 4, 6, 11, 15, and 17-23 are withdrawn from consideration.

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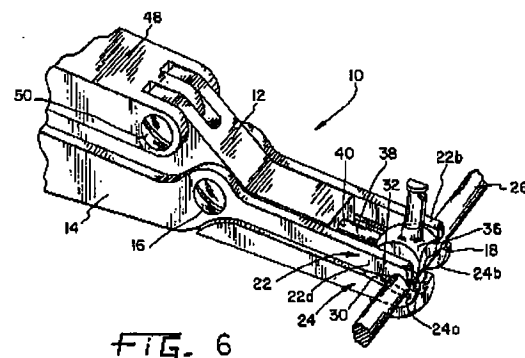
<sup>1</sup> Applicants note that the Examiner forgot to list claim 15 as being withdrawn, and the listing of withdrawn claims should include claims 4, 6, 11, 15, and 17-23.

***Rejections Pursuant to 35 U.S.C. §102******Rejections Pursuant to Hayes I***

The Examiner rejects claims 1-3, 5, 12, 13, and 16 pursuant to 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,364,397 of Hayes et al. (hereinafter “Hayes I”). In particular, the Examiner argues that Hayes I discloses “an implant gripping member 22a and 22b, a rod-engaging member 24a and 24b in the form of opposed arms, and a pusher member/actuator 14.” Applicants disagree with the Examiner’s rejection.

Independent claim 1 recites a spinal rod approximator that includes an implant-gripping member having a distal portion that is adapted to engage the rod-receiving member of a spinal implant and a rod-engaging member slidably coupled to the implant-gripping member at a position proximal to the implant-gripping member. The distal portion of the implant-gripping member includes opposed legs that are adapted to be positioned under a distal end of a rod-receiving member of a spinal implant. The device also includes a pusher member that is coupled to at least one of the implant-gripping member and the rod-engaging member. Independent claim 12 recites a spinal rod approximator that includes first and second components that are slidably coupled to one another and adapted for relative movement along a sliding axis. The first component includes an implant-gripping portion having a distal portion that includes opposed legs that are adapted to be positioned under a distal end of a rod-receiving member of a spinal implant. The second component includes a rod-engaging portion that is offset from the sliding axis and is adapted engage a spinal rod to move the spinal rod toward the rod-receiving member of the spinal implant being engaged by the implant-gripping portion.

Hayes I is deficient as a reference for several reasons. First, Hayes I fails to teach or even suggest an implant-gripping member or implant-gripping portion, as required by claims 1 and 12. Hayes I teaches an instrument 10 that includes a main handle 12 pivotally connected to a lever handle 14 about a pin 16, as shown in FIG. 6 of Hayes I which



is reproduced herein. Forked jaws 22, 24 having legs 22a, 22b, 24a, 24b are located at the distal ends of each handle 12, 14. In use, the legs 22a, 22b, 24a, and 24b are positioned on opposed sides of an implant coupler 36 and they close together to firmly engage a rod 26. The legs do not engage any portion of the coupler, and thus, contrary to the Examiner's assertions, Hayes I does not teach or even suggest a device that includes an implant-gripping member.

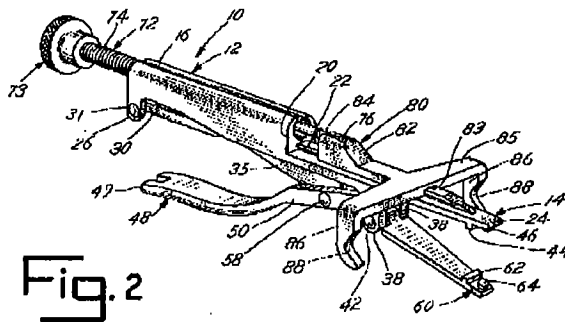
Since Hayes I does not teach or even suggest an implant-gripping member, it naturally follows that Hayes I does not teach an implant-gripping member having opposed legs that are adapted to be positioned under a distal end of a rod-receiving member of a spinal implant. As noted above, Hayes I teaches jaws which grip the rod on opposed sides of an implant. Neither jaw includes any type of leg formed thereon that is adapted to extend under the rod-receiving member of a spinal implant, as required by independent claims 1 and 12.

Accordingly, independent claims 1 and 12, as well as claims 2-3, 5, 13, and 16, which depend therefrom, distinguish over Hayes I and represent allowable subject matter.

### Rejections Pursuant to Hayes II

The Examiner also rejects claims 1, 2, 7-10, and 12-16 pursuant to 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,020,519 of Hayes et al. (hereinafter “Hayes II”).<sup>2</sup> Applicants disagree with the Examiner’s rejection.

As noted above, independent claims 1 and 12 recite an implant-gripping member or implant-gripping portion having a distal portion with opposed legs that are adapted to be positioned under a distal end of a rod-receiving member of a spinal implant. Hayes II does not teach or even suggest an implant-gripping member having such a configuration. As shown in FIG. 2 of Hayes II, which is reproduced herein, the Hayes II device has upper and lower jaws



<sup>2</sup> Applicants note that the Office Action references U.S. Patent No. 5,202,519 of Khare entitled “Isomerization Process and Catalyst Therefor.” The correct citation for the Hayes II patent is U.S. Patent No. 5,020,519.


14, 60 that each include a circular transverse abutment 64 and a rectangular tooth 62 formed thereon for engaging an implant. As explained in Col. 4, lines 22-28 of Hayes II, the abutments 64 extend into corresponding bores formed in the sidewall of the head of an implant. Neither jaw 14, 60 includes any type of leg formed thereon that is adapted to extend *under* the rod-receiving member of a spinal implant, as required by claims 1 and 12. Accordingly, independent claims 1 and 12, as well as claims 2, 7-10, and 13-16 which depend therefrom, distinguish over Hayes II and represent allowable subject matter.

***Conclusion***

Applicants submit that all claims are now in condition for allowance, and allowance thereof is respectfully requested. The Examiner is encouraged to telephone the undersigned attorney for Applicants if such communication is deemed to expedite prosecution of this application.

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Respectfully submitted,

By 

Lisa Adams

Registration No.: 44,238

NUTTER MCCLENNEN & FISH LLP

World Trade Center West

155 Seaport Boulevard

Boston, Massachusetts 02210-2604

(617) 439-2000

(617) 310-9000 (Fax)

Attorney for Applicant